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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

JORGE A. GUERRERO,

Defendant and Appellant.

B206626

(Los Angeles County
Super. Ct. No. PA056375)

APPEAL from a judgment of the Superior Court of Los Angeles County. Burt Pines, Judge. Affirmed.

Steven Schorr, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, James W. Bilderback II and J. Michael Lehmann, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Jorge Guerrero of premeditated murder and assault with a firearm. On appeal, Guerrero contends the trial court committed prejudicial error by instructing the jury with CALCRIM No. 1403, which permits a jury to consider evidence of gang activity when evaluating the credibility or believability of a witness. Guerrero also contends the trial court had no authority to impose a firearm enhancement on the assault count. We affirm the judgment.

BACKGROUND

Sometime in April 2004, Irma Hernandez became acquainted with Guerrero through her cousin. Hernandez and her cousin lived in the same home and defendant would visit her cousin approximately twice a week. Over the course of a month, Guerrero, a member of the Pacoima Van Nuys Boys gang, frequently asked Hernandez about other visitors to her home and explained that he was interested in catching anyone who was “slipping.” “Slipping,” in gang parlance, occurs when a gang member unwittingly enters rival gang territory or a neighborhood deemed off-limits to his gang. Guerrero showed Hernandez a gun and live ammunition and told her that if he caught anyone slipping, he would shoot that person with hollow point bullets.

On the evening of May 16, 2004, Hernandez and her fiancé, Kelvin Johnson, were standing outside her home waiting for a pizza delivery. Guerrero approached her home in his vehicle, drove two full circles at a nearby intersection, and then partially pulled into her driveway. Inside Guerrero’s vehicle were two other individuals, one of whom was a member of the Van Nuys Boys. Hernandez stood in the driveway facing Guerrero’s vehicle, and Johnson approached Guerrero on the driver’s side window, which was rolled down. Johnson, who was holding nothing but a cigarette, asked Guerrero: “What’s going on?” Guerrero replied: “I’ll show you what’s going on” and then immediately shot Johnson in the chest. Johnson grabbed his chest and ran past Hernandez towards the garage. Guerrero fired two additional shots toward the direction of Johnson and Hernandez and then sped away. The coroner recovered two bullets from Johnson’s body

and determined that he died of a gunshot wound to the chest. At the time of the shooting, Johnson was a member of the Vaughn Street gang.

From Hernandez's home, Guerrero drove to a nearby house occupied by Douglas Garcia, another member of the Van Nuys Boys. Guerrero asked Garcia for a clean shirt and left on foot with the two other occupants of the vehicle. Guerrero fled to San Diego and then to Tijuana, Mexico. Several months later, he traveled to Bakersfield to stay with another member of the Van Nuys Boys. Officers arrested Guerrero in Bakersfield, and, when they asked him about the May 16 shooting, he denied any knowledge or involvement with the shooting. From Guerrero's home, officers recovered one poster depicting a rival gang member shot and lying on the street, and another poster with the names of rival gangs crossed out.

The prosecution charged Jorge Guerrero with murder (Penal Code § 187, subd. (a); count one)¹, attempted first degree murder (§§ 187, subd. (a), 664; count two), and shooting from a motor vehicle (§ 12034(c); count 3). As to all counts, the information alleged that Guerrero committed the instant offenses for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22); and that he personally used a firearm (§ 12022.53, subd. (b)), personally and intentionally discharged a firearm (§ 12022.53, subd. (c)), and personally and intentionally discharged a firearm, which proximately caused great bodily injury and death (§ 12022.53, subd. (d)).

At trial, the prosecution's gang expert testified that Guerrero shot at Johnson and Hernandez to increase his own stature and the stature of the Van Nuys Boys, and thus committed the charged offenses for the benefit of, at the direction of, or in association with the Van Nuys Boys.

Guerrero testified that he learned sometime before May 16 that Johnson was a member of the Vaughn Street gang, had a reputation for violence, and bore some animosity toward Guerrero. Because Johnson had the reputation of always carrying a gun, Guerrero felt it was necessary to carry his own gun for protection. On May 16,

¹ All subsequent references are to the Penal Code unless otherwise specified.

Guerrero drove to Hernandez's house to visit her cousin. As Guerrero waited in the driveway, Johnson approached the driver's side window and drew a gun from his waistband when he was two feet away. After a brief exchange, Johnson began to raise his gun.² Guerrero, fearing for his life, shot him two to four times. Guerrero denied shooting in Hernandez's direction.

At the close of the prosecution's case, the trial court struck the premeditation allegation on count two and the gang allegations on counts two and three, pursuant to section 1118.1.

On count one, the jury convicted Guerrero of first degree murder and found true the allegations that Guerrero committed the instant offense for the benefit of, at the direction of, or in association with a criminal street gang, and that he personally and intentionally used and discharged a firearm that caused death. On count three, the jury convicted Guerrero of the lesser included offense of assault with a firearm and found true the allegation that Guerrero personally used a firearm. The jury acquitted Guerrero of count two, attempted murder.

The trial court denied probation and sentenced defendant to a total term of 50 years to life in state prison calculated as follows: On count one, the court sentenced Guerrero to 25 years to life for the conviction and an additional 25 years to life for the firearm enhancement pursuant to section 12022.53, subdivision (d). The court stayed sentence on the remaining firearm findings and the gang finding. On count three, the court imposed an upper term of four years and an additional ten years pursuant to section 12022.5. The court ordered the sentence for count three run concurrently with the sentence for count one. The court awarded Guerrero 1,211 days of presentence custody credit. Guerrero timely appealed from the judgment.

² According to Guerrero, Johnson asked him: "What the fuck are you doing here?" Guerrero replied that he was not looking for any problems and Johnson replied: "Irene already told you that I don't want you coming up here. You fucked up."

DISCUSSION

I. Instructional Error

Without objection by defense counsel, the trial court instructed the jury with CALCRIM No. 1403, regarding the permissible and impermissible uses of evidence of gang activity.³ On appeal, Guerrero contends the instruction violated his right to due process and a fair trial by “diminishing [the people’s] burden of proof” and “making it easier for the jury to convict him based on a skewed assessment of his veracity.”

The Attorney General argues that Guerrero has forfeited his instructional error claim by failing to object to the instruction below. An instructional error that affects a defendant’s “substantial rights” may be reviewed on appeal even without an objection in the trial court. (§ 1259; *People v. Christopher* (2006) 137 Cal.App.4th 418, 426-427 [“an appellate court may review any instruction given even though no objection was made in the lower court if the substantial rights of the defendant are affected”].) We therefore address the merits of Guerrero’s claim.

Guerrero challenges CALCRIM No. 1403 in two respects: First, he argues that even though the instruction specifically prohibits jurors from using gang evidence to make conclusions about his character or disposition to commit crime, it nonetheless presents “a back-door way of facilitating the consideration of highly prejudicial gang evidence in a manner so closely related to character and disposition evidence as to obviate any meaningful protections provided by the purported limitations placed on the

³ The court gave the following version of the instruction: “You may consider evidence of gang activity only for the limited purpose of deciding whether the defendant acted with the intent, purpose, and knowledge that are required to prove the gang-related crimes and enhancements charged; or the defendant had a motive to commit the crimes charged; or the defendant actually believed in the need to defend himself. [¶] You may also consider this evidence when you evaluate the credibility or believability of a witness and when you consider the facts and information relied on by an expert witness in reaching his or her opinion. [¶] You may not consider this evidence for any other purpose. You may not conclude from this evidence that the defendant is a person of bad character or that he has a disposition to commit crime”

evidence.” Second, Guerrero argues the instruction’s reference to “gang-related crimes” created a mandatory, conclusive presumption of guilt. We find both arguments unpersuasive.

Purportedly erroneous instructions are reviewed in the context of the entire charge to determine whether it is reasonably likely the jury misconstrued or misapplied the challenged instruction. (*People v. Dunkle* (2005) 36 Cal.4th 861, 899.) Instructional error that does not impair a federal constitutional right requires reversal only if it is reasonably probable that a properly instructed jury would have returned a verdict more favorable to the appellant. (*People v. Rogers* (2006) 39 Cal.4th 826, 875; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

It is well established that jurors may consider evidence of gang activity when evaluating a witness’s bias or credibility in certain circumstances. For instance, evidence that a witness and defendant belong to the same gang “is relevant to establish the witness’s bias.” (*People v. Bojorquez* (2002) 104 Cal.App.4th 335, 342; see also *In re Wing Y.* (1977) 67 Cal.App.3d 69, 76 [“a witness may . . . be asked about group membership he shares with a party to the action, on the theory that such common membership is a factor that tends to impeach a witness’s testimony by establishing bias”]; *People v. Ruiz* (1998) 62 Cal.App.4th 234, 242 [evidence that the defendant and exculpatory witness belonged to same gang was relevant to show the witness’s “probable motive to give false evidence to protect a ‘homeboy’”].)

Likewise, evidence that a particular witness belongs to a gang and fears retaliation from a rival gang (or his own gang) for testifying at trial is relevant to the witness’s credibility. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 945-946 [“Evidence that a witness [who is a gang member] is afraid to testify or fears retaliation for testifying is relevant to the credibility of that witness and is therefore admissible. [Citations.] An explanation of the basis for the witness’s fear is likewise relevant to her credibility and is well within the discretion of the trial court”].) Additionally, evidence that a witness (who is not a gang member) fears retaliation from a gang for testifying in court is also relevant to the witness’s credibility. (*People v. Ayala* (2000) 23 Cal.4th 225, 276 [“Various

witnesses against defendant feared the Mexican Mafia, and . . . that bore on the witnesses' credibility"'].)

The cases cited above demonstrate that there is nothing problematic *per se* about using evidence of gang activity (including membership in a gang) to evaluate credibility. While there are limitations on the use of gang evidence, as we now explain the limitations do not apply in this case. (E.g., *People v. Avitia* (2005) 127 Cal.App.4th 185, 192 ["gang evidence is inadmissible if introduced only to 'show a defendant's criminal disposition or bad character as a means of creating an inference the defendant committed the charged offense.' [Citations.]"]; *People v. Hernandez* (2004) 33 Cal.4th 1040, 1050 ["in cases *not* involving the gang enhancement, we have held that evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal"'].)

The jury was specifically instructed not to use evidence of gang activity to conclude that Guerrero, or any other witness at trial, was a "person of bad character or [had] a disposition to commit crime." Jurors are presumed to understand and follow the court's instructions. (*People v. Delgado* (1993) 5 Cal.4th 312, 331.) Moreover, evidence of gang activity in this case was highly relevant in assessing whether Guerrero killed Johnson as part of a gang turf war (which would support the gang enhancement) or whether he killed him in self-defense (which would not). We reject Guerrero's contention that the instruction "placed an improper and excessive burden" on him. The instruction plainly applies to *any* witness, whether for the prosecution or the defense. Here, the prosecution had an admitted gang member testify in its case in chief, and his testimony was subject to the same instruction. Thus, the instruction did not reduce the prosecution's burden of proof or otherwise violate due process or equal protection.

We turn to Guerrero's contention that the instruction's reference to "gang-related crimes" created a mandatory and conclusive presumption of guilt. The instruction, as read to the jury, provided: "You may consider evidence of gang activity only for the limited purpose of deciding whether the defendant acted with the intent, purpose, and knowledge that are required to prove the gang-related crimes and enhancements charged." As we understand Guerrero's argument, use of the phrase "gang-related

crimes” presumes the truth of the gang allegations. But the court did not instruct the jury to simply determine whether Guerrero committed “gang related” crimes. Rather, the court instructed the jury to determine whether the prosecution proved beyond a reasonable doubt that Guerrero committed the crimes charged – i.e., murder, attempted murder, and shooting from a vehicle – and that he did so “for the benefit of, at the direction of, or in association with a criminal street gang” with the intent to “assist, further, or promote criminal conduct.” Simply referring to the charged crimes as “gang-related” did not lessen the prosecution’s burden.

II. Firearm Enhancement

On count three, the information alleged that Guerrero committed the offense of shooting from a motor vehicle and that he personally used a firearm (§ 12022.53, subd. (b)) in the commission of that offense.⁴ The information did not allege a firearm enhancement under section 12022.5. Although “shooting from a motor vehicle” is not one of the offenses subject to an enhancement under section 12022.53, at no point did Guerrero seek to dismiss the enhancement from count three on that basis.

The jury convicted Guerrero of the lesser included offense of assault with a firearm (§ 245, subd. (a)(2)) and found true the allegation that “defendant personally used a firearm” to commit the offense. At the sentencing hearing, the trial court imposed a 14-year concurrent sentence on count three calculated as follows: “On count 3, for the defendant’s crime of assault with a firearm, a violation of Penal Code section 245(a)(2) . . . the defendant is sentenced to state prison for the term of four years, the high term. Pursuant to section 12022.5, the defendant is sentenced to an additional and consecutive term of imprisonment for ten years, also the high term.” The court went on to list five reasons for its selection of the high terms in the underlying offense and the sentence

⁴ The information also alleged that Guerrero personally and intentionally discharged a firearm (§12022.53, subd. (c)), and personally and intentionally discharged a firearm, which proximately caused great bodily injury and death (§12022.53, subd. (d)). These provisions are not at issue here.

enhancement. Guerrero did not object to the court's imposition of the enhancement pursuant to section 12022.5.

On appeal, Guerrero challenges the court's imposition of the firearm enhancement. According to Guerrero, the prosecution did not "plead and prove" an enhancement under section 12022.5, and thus the trial court was not authorized to impose a sentence based on that statutory provision.

The Attorney General argues that Guerrero has forfeited his objection by failing to raise it below. In the sentencing context, the forfeiture doctrine applies "to claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices." (*People v. Scott* (1994) 9 Cal.4th 331, 353.) "Included in this category are cases in which the stated reasons allegedly do not apply to the particular case, and cases in which the court purportedly erred because it double-counted a particular sentencing factor, misweighed the various factors, or failed to state any reasons or give a sufficient number of valid reasons." (*Ibid.*) In contrast, the imposition of an "unauthorized sentence" may be challenged for the first time on appeal. (*Id.* at p. 354.) "[A] sentence is generally 'unauthorized' where it could not lawfully be imposed under any circumstance in the particular case." (*Ibid.*)

Assuming the alleged error falls into the latter category of errors reviewable at any time, we turn to the merits of Guerrero's claim.

Section 1170.1, subdivision (e) provides that "[a]ll enhancements shall be alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the trier of fact." *People v. Mancebo* (2002) 27 Cal.4th 735 explained that due process requires that a defendant be provided with fair notice of the specific enhancement allegations that will be used to increase the punishment, i.e., compliance with section 1170.1. (*Mancebo*, at p. 747.) "To avoid due process violations, the facts giving rise to a sentence enhancement must be alleged in the accusatory pleading so that defendant can prepare his defense. [Citation.]" (*People v. Jimenez* (1992) 8 Cal.App.4th 391, 398.)

People v. Strickland (1974) 11 Cal.3d 946 (*Strickland*) is instructive. In *Strickland*, the prosecution charged defendant with murder and alleged, pursuant to then section 12022.5, that he used a firearm in the commission of that offense.⁵ The jury convicted the defendant of the lesser included offense of voluntary manslaughter, and the trial court imposed an enhancement under section 12022.5. On appeal, defendant argued that because voluntary manslaughter was not an enumerated offense under section 12022.5 the enhancement was improper. The Supreme Court agreed that the enhancement under section 12022.5 was improper, but concluded that defendant was “nevertheless, subject to additional punishment under section 12022 of the Penal Code because of his having been armed with a deadly weapon at the time he committed the crime of voluntary manslaughter, a felony.”⁶ (*Id.* at p. 961) The Court reasoned that the defendant “was charged in the commission with the use of a firearm under section 12022.5, [and] thus had notice that his conduct [could] also be in violation of section 12022.” (*Id.* at p. 961.)

In compliance with the due process concerns articulated in *Mancebo*, the information provided Guerrero notice of the *facts* giving rise to the sentence enhancement for count three – i.e., that he personally used a firearm in the commission of the underlying offense – even though it cited section 12022.53, subdivision (b), instead of section 12022.5, subdivision (a). And under the reasoning of *Strickland*, by alleging an

⁵ At the time, section 12022.5 provided: “Any person who uses a firearm in the commission or attempted commission of a robbery, assault with a deadly weapon, murder, rape, burglary, or kidnapping, upon conviction of such crime, shall, in addition to the punishment prescribed for the crime of which he has been convicted, be punished by imprisonment in the state prison for a period of not less than five years.”

⁶ At the time, section 12022 provided: “Any person who commits or attempts to commit any felony within this state while armed with any of the deadly weapons, as defined by subdivision (f) of Section 3024, upon conviction of such felony or of an attempt to commit such felony, shall in addition to the punishment prescribed for the crime of which he has been convicted, be punishable by imprisonment in a state prison for not less than five nor more than 10 years.”

enhancement under section 12022.53, the prosecution placed Guerrero on notice that his conduct was subject to the broader scope of section 12022.5.⁷

In short, Guerrero was put on notice that the prosecution would seek to prove the fact that he personally used a firearm, and the jury concluded that the prosecution carried its burden. We therefore affirm the ten-year enhancement imposed on count three.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

BAUER, J.^{*}

We concur:

MALLANO, P. J.

ROTHSCHILD, J.

⁷ The language of the two sections is virtually identical. (Compare § 12022.53, subd. (b) [“any person who, in the commission of a felony specified in subdivision (a), personally uses a firearm, shall be punished by an additional and consecutive term of imprisonment in the state prison for 10 years”] with § 12022.5, subd. (a) [“any person who personally uses a firearm in the commission of a felony or attempted felony shall be punished by an additional and consecutive term in the state prison . . .”].)

^{*} Judge of the Orange County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.